THE IMPORTANCE OF *CY PRES* IN MODERN CLASS ACTION JURISPRUDENCE AND MYTHS CONCERNING ITS USE

by
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When class actions resolve, it is common for some or even all funds paid to the class to remain undistributed. All U.S. circuits, 40 states, and the Class Action Fairness Act have permitted undistributed funds to be distributed as cy pres. *Recently, a few commentators have voiced constitutional objections to* cy pres, *based upon standing pursuant to Article III, the Rules Enabling Act, and the First Amendment. However, these analyses generally ignore the congressional mandate found within Rule 23 and the power of the courts to supervise* cy pres *distribution. Finally, the following recommendations are made: such awards should not be used when settlement funds can be distributed to class members; these funds should not go back to a defendant or its surrogates in order to prevent undermining the class action deterrent function; and class representatives and counsel, representing the needs of the class, should select proposed recipients. Any residual settlement money should be distributed in a way that would indirectly benefit the class (including to non-profit access to justice organizations) under the following factors: (1) what the lawsuit is about; (2) the objectives of any statute that was violated; (3) the loss suffered by the class members; and (4) the geographic breadth of the class.*

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INTRODUCTION

The use of *cy pres* in the context of class action settlements has in the last decade come under attack from a small group of academics and practitioners. This Article discusses class action settlement *cy pres* in three different ways. First, there is a discussion of the broad expansion of the use of *cy pres* across state and federal courts. In the second Section, the most common legal attacks on *cy pres* in the class action context are discussed, including supposed problems with Article III standing and the Rules Enabling Act, First Amendment concerns, and assertions that the use of *cy pres* encourages problematic behavior on the part of plaintiff class action practitioners. The final Section addresses some of the implied concerns of Chief Justice Roberts in *Marek v. Lane*, 571 U.S. 1003 (2013), including questions regarding the distribution of the funds in question and the selection of *cy pres* recipients.

I. *CY PRES* AS A PART OF CLASS ACTION SETTLEMENTS HAS BECOME ENSCONCED IN AMERICAN JURISPRUDENCE

The *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable trusts when a gift is specified to go to a charitable entity that either no longer exists, has become infeasible to distribute to, or whose receipt of funds would be in contravention of public policy.[1] Over time, 48 states have institutionalized this elegant solution of transferring funds to the next best charitable or public interest use in a way that would satisfy "as nearly as possible" the trust settlor's original beneficent intent.

With the advent of class actions, another source of funds has emerged whose allocation at times has proven difficult to distribute. This occurs when class action settlements cannot be fully distributed due to an inability to locate absent class members, class members failing to do what is necessary to receive the funds owed to them, or, less frequently, when it is economically or administratively infeasible to distribute funds to class members (for example, when the costs of individual distribution to class members exceeds the amount to be distributed).[2]

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[1] *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002).

[2] PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.07 cmt. a (AM. LAW INST. 2010) [hereinafter ALI PRINCIPLES]; 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:20 (4th ed. 2002).

As procedures involved in class action litigation have matured, it has been accepted in federal courts that when cases are resolved and excess funds remain, those funds will be distributed in the form of *cy pres*. Examples within every circuit can be found where a *cy pres* distribution has been approved.[3]

Cy pres distributions have also been widely used after the settlement of state court class actions. In 23 states (and Puerto Rico), state supreme courts or legislatures have adopted specific rules or statutes that authorize *cy pres*. Meanwhile, *cy pres* distributions have been approved by courts in at least 17 other states where state supreme court rules or statutes have not been set forth. (See Table A for a list of state statutes and supreme court rules, as well as examples of court decisions in states absent either.)

The U.S. Congress has expressly authorized the use of *cy pres.* With the passage of the Class Action Fairness Act of 2005 ("CAFA"),[4] Congress specifically included the following language: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties."[5]

Thus, whether promoted by statute, court rules, or court precedent, the use of *cy pres* has become broadly established throughout American jurisprudence. This is

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[3] Keepseagle v. Perdue, 856 F.3d 1039, 1043 (D.C. Cir. 2017); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1129 (9th Cir. 2017) (recognizing "courts have long employed *cy pres* remedies when some or even all potential claimants cannot be identified"); Jones v. Dancel, 792 F.3d 395, 400 n.6 (4th Cir. 2015) (noting that the arbitrator distributed damages in equal portions to two recipients because it was not practical to distribute *de minimis* amounts to the class); Tennille v. W. Union Co., 809 F.3d 555, 563 (10th Cir. 2015); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013) (approving *cy pres* "for a purpose related to the class injury"); Nelson v. Mead Johnson & Johnson Co., 484 F. App'x 429, 435 (11th Cir. 2012) (affirming a settlement with a *cy pres* distribution when class members received "full compensation" under the terms of the settlement); Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011) (permitting *cy pres* when either: (1) infeasible to distribute additional settlement funds to class members; or (2) claimants have been fully compensated and further distribution would be a windfall); *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 33–36 (1st Cir. 2009) (holding the trial court did not abuse its discretion in approving a settlement that distributed excess funds for cancer research or patient care); *In re* Holocaust Victim Assets Litig., 424 F.3d 132, 146 (2d Cir. 2005) (acknowledging that district courts may "distribute settlement proceeds to the neediest class members"); Powell v. Ga. Pac. Corp., 119 F.3d 703, 706–07 (8th Cir. 1997) (approving a *cy pres* distribution to a minority student scholarship program where most class members lived); Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 502 (7th Cir. 1989); *In re* Polyurethane Foam Antitrust Litig., 178 F. Supp. 3d 621, 625 (N.D. Ohio 2016).

[4] Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

[5] 28 U.S.C. § 1712(e) (2012).

no doubt because it serves three salutary purposes: 1) it allows for an effective distribution of residual funds to non-profit entities; 2) it preserves the deterrent effect of class actions; and 3) it permits parties to settle litigation.

II. CHALLENGES TO THE LEGAL AND CONSTITUTIONAL UNDERPINNINGS OF *CY PRES* IN THE CLASS ACTION SETTING

A. Article III's Requirement of Standing

Several commentators have taken the position that *cy pres* should not be allowed because it allegedly constitutes a court-imposed payment of unclaimed class funds that are being taken from private litigants and then given to outside parties whose rights are not at issue in the lawsuit.[6] They argue that what they describe as a redistribution of unclaimed funds to charities transforms the adversarial two-party judicial process into an unconstitutional trilateral process. In essence, their position is that *cy pres* recipients themselves have no standing and, therefore, the requirements of Article III, § 2 of the U.S. Constitution cannot be met.

However, arguing that *cy pres* distributions impermissibly forge a trilateral relationship mischaracterizes what *actually* happens in class action settlements. Initially, in order to resolve class action litigation, district courts must first approve a proposed settlement and, as part of that, any proposed distribution.[7] Until a settlement is approved, the only parties with standing before the court are the adversarial parties, i.e., the class representative(s) and settling defendant(s). Although a court may be free to elicit information from a prospective *cy pres* recipient, the *cy pres* recipient at this point has no rights and, therefore, no standing.

It is only after approval of the settlement that a *cy pres* recipient obtains any claim to funds and, therefore, an ability to assert its rights. This is similar to the way proposed recipients are treated under charitable trust law.[8] Once their interest is

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[6] Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010) (the article most frequently cited arguing against the use of *cy pres*); *see also* Goutam U. Jois, *The Cy Pres Problem and the Role of Damages in Tort Law*, 16 VA. J. SOC. POL'Y & L. 258, 259 (2008); Sam Yospe, Note, Cy Pres *Distributions in Class Action Settlements*, 2009 COLUM. BUS. L. REV. 1014, 1027–41 (2009).

[7] *See* Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 698 (7th Cir. 2013) (remanding district court's order of *cy pres* award as premature, but stating "[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied," including potentially ordering a *cy pres* distribution); FED. R. CIV. P. 23; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 13.1, at 167–82 (2004); 3 CONTE & NEWBERG, *supra* note 2, § 10:16.

[8] In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their *cy pres* power. *See, e.g.*, *In re* Trustco Bank, 929 N.Y.S.2d 707, 711 (N.Y. Sup. Ct. 2011) ("[T]he issue of standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation. . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is

established, *cy pres* recipients necessarily can participate in court actions because having agreed to accept funds, they have submitted to the court's jurisdiction. At this point, *cy pres* recipients have standing to assert or defend their claims to the funds, satisfying Article III's case-or-controversy requirement.

The other case-or-controversy argument that has been raised is a challenge to the underlying standing of the class representatives to have brought the action when there later turns out to be a *cy pres*-only settlement.[9] The assertion is that if the class members receive no direct relief, the lawsuit could not have had standing because there could not have been a "case or controversy." Ignored is the fact that when putative class representatives seek certification, they must not only satisfy Rule 23(a)(1)–(4) but, as all other litigants, meet the requirements of standing. Subsequently, whether or not class members actually succeed in recovering monetary damages sufficient for individual distribution has nothing to do with standing; indeed, taken to its logical conclusion such *post hoc ergo propter hoc* reasoning would lead to the absurd argument that every plaintiff bringing a lawsuit that does not result in a recovery of damages did not have standing *ab initio*.[10]

B. The Rules Enabling Act

Another contention is that a court-imposed payment of unclaimed settlement funds from a defendant to a third-party *cy pres* recipient transforms the class members' individual settlements into a civil fine. As a result, it is argued that the class as a whole is being granted more rights than its members would have had if they had filed individual lawsuits.[11] Under substantive laws that only permit recovery of compensatory damages for the class itself, it is argued that such a civil fine cannot be authorized.[12]

Courts have uniformly rejected this argument as it misperceives congressional intent in enacting Rule 23.[13] There can be no question that Congress specifically approved of the aggregation of private causes of action into representative actions, thereby allowing plaintiffs to recover damages on a collective basis. A class action lawsuit, therefore, does not abridge, enlarge, or modify the substantive right to bring a collective action nor afterwards to settle the lawsuit. The *cy pres* distribution itself

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all the more appropriate in *cy pres* proceedings, where the issues of whether to apply *cy pres* and how to apply it are interrelated.").

[9] *E.g.*, Frank v. Gaos, 139 S. Ct. 1041, 1043 (2019).

[10] This "standing" argument also ignores the fact that *cy pres*, as will be discussed at pp. 606–07, does provide relief to the class, albeit indirectly; therefore, it is incorrect to say that there is no redressability due to an alleged absence of relief directly to class members.

[11] Redish et al., *supra* note 6, at 644–45.

[12] *Id.* at 644–46.

[13] *See In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 n.8 (3d Cir. 2013); ALI PRINCIPLES, *supra* note 2, § 3.07 cmt. a.

is only one part of the class representative(s)' administrative function of distributing the settlement proceeds.[14] As the Third Circuit noted:

> Because "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action," we do not believe the inclusion of a cy pres provision in a settlement runs counter to the Rules Enabling Act.[15]

This is in accord with *ALI Principles*, § 3.07 cmt. a, which both respects the Rules Enabling Act and concludes that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.

C. Claimed First Amendment Concerns

It has also been argued that the First Amendment is allegedly violated when class representative(s) agree to give *cy pres* funds to charitable entities, because individual absent class members have no control over which charitable organization(s) will receive the funds.[16] Therefore, when settlement funds are directed to non-profit entities, absent class members may be forced to support organizations with which they may not agree. This, it is argued, would constitute a violation of the First Amendment's proscription against compelled speech as has been recently articulated by the U.S. Supreme Court.[17]

What distinguishes the class situation from the "compelled speech" jurisprudence is that absent class members would already have been given notice of their right not to participate in the case at all, and, therefore, ultimately its settlement, by opting out of the class action.[18] In having failed to opt out of the class, absent class members have consented to the representative plaintiff(s) approved by the court acting on behalf of their interests rather than being compelled to do so. This consent

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[14] This administrative function is one basis for the court's power to approve *cy pres*. A second basis is the court's general equitable powers. Wilson v. Sw. Airlines, Inc., 880 F.2d 807, 813 (5th Cir. 1989) (treating *cy pres* distribution as a matter of the federal court's inherent equitable discretion). Finally, there are statutory powers, which have been granted by 23 states and the U.S. Congress as a part of CAFA. *See infra* Table A.

[15] *In re* Baby Prods., 708 F.3d at 173 n.8 (citation omitted).

[16] *See, e.g.*, Brief of Center for Individual Rights as Amicus Curiae in Support of Petitioners, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961).

[17] *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2464 (2018); *see also* Knox v. SEIU, 567 U.S. 298, 309 (2012) ("Closely related to compelled speech . . . is compelled funding of the speech of other private speakers or groups.").

[18] *See* FED. R. CIV. P. 23(c)(2)(B); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court").

includes entering into a settlement and subsequently, if necessary, the designation of *cy pres* recipients. Thus, unlike the required participation at issue in the "compelled speech" cases, an "opt-out" right for class members has been expressly provided for by Congress. While the Supreme Court held that non-members cannot be forced to fund political activity, these cases are, therefore, inapposite in the class context. Those who fail to exercise their right to opt out of a class action have been specifically given notice that they will become class members and class representatives will make decisions on their behalf. This is not an illusory but rather a congressional mandate that results in those not opting out accepting both their membership in the class and the class representatives' decisions.[19]

D. Alleged Problematic Behavior of Class Counsel

A number of commentators have based their criticism not upon the theoretical basis of *cy pres* as a class action settlement tool but rather what they view to be problematic conduct and fee-driven behavior that they claim to be an insidious part of the use of *cy pres* by class counsel.[20] Of course, inherent in any action, including class actions, is the potential for conflicts of interest and less than ethical behavior by litigants and counsel (or even defense counsel and courts). However, multiple rules are in place to address this possibility.

The most common allegation is that class counsel are only concerned with their own fees while disregarding the interests of the class members. To say that this is prolific, however, ignores how fees are generally requested and approved. As a rule, fees are either based upon hours worked, a percentage of the total payment made by the defendant, or both.[21] Often these are negotiated separately with the defendant

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[19] This is not to say that absent class members lose their ability to further challenge the designation of a *cy pres* recipient with which they do not agree. Absent class members have the remaining safeguard that a class action can only be maintained if, among other things, "the representative parties will fairly and adequately protect the interests of the class" as a whole. FED. R. CIV. P. 23(a)(4). If absent class members believe this has not occurred, they may still object as part of the proceedings required by FED. R. CIV. P. 23(e)(5). Indeed, no class settlement may be approved by the court unless notice of the proposed settlement was provided to the members of the class to be bound by the settlement. FED. R. CIV. P. 23(e)(1)(B). Then, a court may approve a settlement that "would bind class members" only "after a hearing and on finding that it is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2); *see, e.g.*, *Frank*, 139 S. Ct. at 1047–48 (Thomas, J., dissenting) (arguing that the settlement did not meet Rule 23 requirements).

[20] Redish et al., *supra* note 6, at 649–50; Yospe, *supra* note 6, at 1032; Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 136 (2014) (relying in part on JOHN H. BEISNER ET AL., *CY PRES*: A NOT SO CHARITABLE CONTRIBUTION TO CLASS ACTION PRACTICE (2010)). For a thoughtful discussion of frequently raised issues and authorities, see Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 913 KAN. L. REV. 65 (2017).

[21] MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 14.121–.122.

and presented to the court in a separate request for approval.[22] And at times, fees are contested by defendants, even though the underlying settlement is agreed to.[23]

It is therefore significant that at the time of a proposed settlement fees must be requested. In evaluating the settlement of a class action, Rule 23 and most states have invested courts with the duty of scrutinizing and approving the settlement agreement, including any fee allocation.[24] The issue then is not the rules themselves but rather the consistency and vigilance of judicial oversight in scrutinizing and, as required, preventing abuses.

In undertaking this review, greater scrutiny tends to be given under certain circumstances. These include where there is little or no distribution to the class,[25] when requested attorneys' fees are high, or when unclaimed funds revert to the defendant whose conduct resulted in the settlement. In the Ninth Circuit, for instance, class action settlements in which the settlement agreement is negotiated prior to formal class certification require "an even higher level of scrutiny."[26] Moreover, recently amended Rule 23(e)(2)(C)(ii) (effective December 1, 2018) specifically requires the trial court to evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

III. GUIDANCE TO CONSIDER IN EVALUATING THE DISTRIBUTION OF *CY PRES*

For the most part, however, critics of *cy pres* ignore the vital role of the courts in evaluating all aspects of a settlement, including *cy pres*. While there are, as always, a few outliers, overall, judges have appropriately performed their job of scrutinizing class action settlements along with the distribution of *cy pres* pursuant to their congressionally and state-mandated administrative duty of evaluating and approving all aspects of class settlements. In *Marek v. Lane*, Chief Justice Roberts' opinion concurring in the majority's denial of certiorari listed a number of questions related to the use of *cy pres* that the U.S. Supreme Court to this date has neither directly addressed nor expressly provided direction for.[27] In response to Justice Roberts's questions, a suggested general guidance is provided below.

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[22] *Id.* § 14.221–.224.

[23] *Id.* § 14.231–.232.

[24] *See* FED. R. CIV. P. 23(e); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (district judges must "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions").

[25] MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 21.611–.612.

[26] *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011); 4 CONTE & NEWBERG, *supra* note 2, § 11:27.

[27] Marek v. Lane, 134 S. Ct. 8, 8–9 (2013) (Roberts, J., concurring).

A. Class Representatives Should Make the Initial Selection of Cy Pres *Recipients*

As a rule, defendants should not be involved in making the selection of *cy pres* recipients. There are several reasons for this. First, one thing that class members must have in common is an injury caused by the defendant(s).[28] Indeed, implied in any settlement (though seldom expressly stated) is that a defendant makes a payment because victims have some legal right to restitution. The result of a successful trial or settlement should be a transfer of wealth from perpetrator to victim and not back to the perpetrator.

Just as a reversion to a defendant is inappropriate, class members should not be compelled to return hard-won compensation to the surrogates for the party that injured them or to beneficiaries selected by them. Certainly, the money paid due to a defendant's misconduct should not be used to burnish the public-relations image of a defendant that inflicted the damage giving rise to the lawsuit.[29] If *cy pres* funds are at all controlled by defendants, the improper result would be that class members will be forced to indirectly support those who caused their injuries, substantially diminishing any deterrent effect of the case's resolution.

Furthermore, carefully scrutinized recipients should generally not include organizations that have previously received substantial payments from a named defendant. This would be particularly true where the *cy pres* award does not increase the overall contribution by the defendant to the entity in question.[30] While in some cases the selected entities might be the most appropriate recipients, the *cy pres* distribution may also appear to be nothing more than part of the continuous funding by the defendant of the entity in question.

As to selection by judges, while there is a strong impetus for judges to select *cy pres* recipients, doing so can be problematic.[31] "The specter of judges and outside entities dealing in the distribution and solicitation of settlement money even when

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[28] *See* FED. R. CIV. P. 23(a)(3); Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

[29] SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs" when "defendants reap goodwill from the donation of monies").

[30] Dennis v. Kellogg Co., 697 F.3d 858, 867–68 (9th Cir. 2012) (raising concerns about a *cy pres* award that allows the defendant to use "previously budgeted funds" to make the same contribution it would have made anyway).

[31] Nachshin v. AOL, LLC, 663 F.3d 1034, 1039 (9th Cir. 2011); *see also In re* Lupron Mktg. & Sales Practices Litig., 677 F.3d 21, 38 (1st Cir. 2012) (affirming, but expressing concern, where the district court, not the parties, chose the *cy pres* recipient); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 180 n.16 (3d Cir. 2013) (not reaching the issue, but stating: "we join other courts and commentators in expressing our concern with district courts selecting *cy pres* recipients"); *see* JOHN H. BEISNER ET AL., *CY PRES*: A NOT SO CHARITABLE CONTRIBUTION TO CLASS ACTION PRACTICE 13–14 (2010).

not done for improper reasons may nevertheless create the appearance of impropriety."[32]

More importantly, judicial participation in the selection process makes it difficult for the court to properly perform its critical review function over the appropriateness of the distribution. Judges need to make a completely independent determination that is not only based on objective criteria but is without any stigma. Indeed, even after selection, the court has a continuing obligation to monitor the distribution of the class's funds. Courts must independently scrutinize whether any of the parties involved in the litigation have significant affiliations with or would personally benefit from a distribution to proposed *cy pres* recipients. Even after selection, it is incumbent upon courts to take a hard look at *cy pres* beneficiaries on an ongoing basis until all funds are disbursed. While these obligations are not unduly burdensome or challenging for a court, judges undertaking such reviews may be compromised (or appear to be compromised) when they themselves are involved in making the selection.

This leaves class representatives as the logical choice for at least the initial determination of *cy pres* recipients. As the settlement property belongs to the class, it should be the role of the class representatives along with their counsel to suggest the proper distribution of the class's funds. Class counsel has represented the class members throughout the litigation and has an independent duty to ensure that any distribution, including that of *cy pres*, is proper.[33] Class representatives share this responsibility.[34] Moreover, arguments against the use of *cy pres*, such as those relying on the Rules Enabling Act or the First Amendment, are vitiated when it is the duly appointed class representatives selecting recipients on behalf of the class.

Once proffered by class counsel and class representatives, it becomes the court's obligation to scrutinize that selection. Ultimately, then, it is the court that has the duty to ensure that class counsel and the class representatives have diligently and fairly assessed the need for *cy pres* and then properly chosen the *cy pres* recipients.

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[32] *See Nachshin*, 663 F.3d at 1041 (providing money to a legal aid foundation that though normally a proper choice for *cy pres* was heavily criticized, because the judge's husband sat on the board); Perkins v. Am. Nat'l Ins. Co., No. 3:05-CV-100 (CDL), 2012 WL 2839788, at *1 (M.D. Ga. July 10, 2012) (approving *cy pres* award to the presiding judge's *alma mater*).

[33] Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) ("Additionally, the distribution preference of class counsel is entitled to deference because class counsel are the only entities with a meaningful equitable stake in the remaining class funds.").

[34] Eubank v. Pella Corp., 753 F.3d 718, 723–24 (7th Cir. 2014) (named plaintiffs have ethical obligations as fiduciaries to the class).

B. Distributing Settlement Funds to Class Members Should Always Be the First Priority

The first duty of class representatives and class counsel is to attempt to effectuate a distribution of class funds to individual class members. *Cy pres* awards, therefore, should not be used when the funds recovered from the defendants can be effectively delivered to class members. Courts should scrutinize *cy pres* requests closely, as numerous federal courts have done.[35] If this direct distribution can be done by crediting a class members' credit card, bank account, cell phone, or other account, it should be. If direct distribution is not possible, but class members can be sent checks, this should constitute a method of distribution provided the transaction costs are not greater than the settlement.[36]

C. Factors to Be Considered in the Selection of Cy Pres *Recipients*

Despite the fact that class members should always be the primary recipients of settlements, at times settlements will inevitably result in funds that cannot be reasonably or economically distributed to class members.[37] It is for this reason that all circuits and the vast majority of state court systems have concluded that *cy pres* distributions are necessary.[38]

While reversion to the defendant has been suggested as an alternative to *cy pres*, this suggestion has been generally, and rightfully, rejected.[39] Reversion completely undermines the deterrent function of class action settlements.[40]

The question then is what factors should be considered by the court in approv-

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[35] *See, e.g.*, Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 434–36 (2d Cir. 2007) (noting it appeared the district court was not aware that it could allocate excess funds to class members as treble damages); Settlement Agreement and General Release at 6, Pearson v. NBTY, 772 F.3d 778 (7th Cir. 2014) (No. 11-0792, 213-1) (renegotiated *cy pres* to give class members $4 million more).

[36] Note that virtually all circuits have concluded that a distribution to class members should not result in a windfall to members who have submitted claims and already been fully compensated. *See, e.g.*, *In re Lupron*, 677 F.3d at 35; Klier v. Elf Atochem N. Am., Inc., 658 F.3d 468, 475 (5th Cir. 2011); *see also* Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 393 (1999).

[37] *See, e.g.*, *In re Lupron*, 677 F.3d at 27; *Jones*, 56 F. Supp. 2d at 356.

[38] *See infra* Table A.

[39] Redish et al., *supra* note 6, at 631.

[40] *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013); *In re Lupron*, 677 F.3d at 632–33; *In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 34 (1st Cir. 2009); *In re* Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1355 n.24 (S.D. Fla. 2011) (one of the most important functions of the class action device in small-stakes cases is the "deterrence of wrongdoing").

ing *cy pres* recipients. After finding that *cy pres* is necessary, most courts have concluded that *cy pres* should be distributed so that it indirectly benefits the class, consistent with the goals of the underlying case. To this end, some courts have rejected proposed *cy pres* distributions which have no relationship to the underlying case.[41]

In determining whether a *cy pres* remedy is properly tailored to the class, a number of courts have generally and appropriately considered the following factors: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute was violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class.[42]

D. Proper Beneficiaries for the Distribution of Cy Pres *Funds*

"Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with widely diffuse harms."[43] This is particularly true when claims involve

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[41] *See, e.g.*, *In re* Airline Ticket Comm'n Antitrust Litig., 307 F.3d 679, 683–84 (8th Cir. 2002) (stating that *cy pres* recipients should have as close a relationship as possible to the class action suit and reflect the geographic scope of the class); *In re* Airline Ticket Comm'n Antitrust Litig., 268 F.3d 619, 626 (8th Cir. 2001). For example, the Ninth Circuit has rejected a number of proposed *cy pres* distributions. *E.g.*, Dennis v. Kellogg Co., 697 F.3d 858, 867 (9th Cir. 2012) (rejecting *cy pres* to organizations that feed the poor where allegation was that Kellogg falsely advertised that its cereal improved children's attentiveness and stating that "appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising"); Nachshin v. AOL, LLC, 663 F.3d 1034, 1040–41 (9th Cir. 2011) (rejecting award to local non-profits with "no apparent relation to the objectives of the underlying statutes, and it is not clear how this organization would benefit the plaintiff class" in case involving internet subscribers receiving wrongfully inserted advertisements in email messages and noting that proper *cy pres* recipients would be "organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance"); Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1307–09 (9th Cir. 1990) (rejecting non-earmarked *cy pres* to humanitarian organization in Mexico where Mexican farm workers sued for violation of Farm Labor Contractor Registration Act).

On the other hand, *Principles of the Law: Aggregate Litigation* does caution that while *cy pres* recipients should be those "whose interests reasonably approximate those being pursued by the class," there are times when no such recipients exist and, still, the American Law Institute concludes, "a court may approve a recipient that does not reasonably approximate the interests of the class." The reason for this is that if the scope is too narrowly limited, appropriate *cy pres* recipients may not always be possible or practical and this may unnecessarily complicate the socially desirable settlement of class action disputes. ALI PRINCIPLES, *supra* note 2, § 3.07(c).

[42] *See, e.g.*, *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1067 (8th Cir. 2015) (quoting ALI PRINCIPLES, *supra* note 2, § 3.07(c) cmt. b); Lane v. Facebook, Inc., 696 F.3d 811, 819–20 (9th Cir. 2012); *Nachshin*, 663 F.3d at 1037–38; *In re* Holocaust Victim Assets Litig., 424 F.3d 132, 147 (2d Cir. 2005); *In re* Airline Ticket Comm'n, 268 F.3d 619, 626 (8th Cir. 2001); *In re* Polyurethane Foam Antitrust Litig., 178 F. Supp. 3d 621, 625 (N.D. Ohio 2016).

[43] Brief for Petitioner at 20, Frank v. Gaos, 139 S. Ct. 1041 (2019) (No. 17-961).

only small individual recoveries where the transaction costs for individual litigants are too high to pursue the claim or for individual counsel to take on the representation. However, any failure to make complete individual distributions cannot denigrate that at their core the fundamental purpose of every class action is to provide access to justice for people who on their own would not realistically be able to obtain the full protection of the judicial system.

Given that the class action device provides litigants access to justice that they might not otherwise have, the use of *cy pres* awards to organizations whose mission is to provide such access has been viewed as a perfect fit.[44] Legal aid and access to justice organizations with objectives directly related to the underlying statutes or claims at issue in relevant class actions are, therefore, very appropriate *cy pres* recipients.

This is not to say that *cy pres* even to such organizations should be haphazardly given. In national class actions, *cy pres* recipients should have a nationwide scope. *Cy pres* from settlements related to consumer fraud, securities violations, or discrimination, for instance, should go to organizations that assist similarly situated individuals who have been subjected to such fraud, violations, or discrimination or may be in the future.

Finally, when c*y pres* recipients are newly created organizations, those entities should be carefully scrutinized. Even if there is a "fit," the lack of a track record of performance and the reasons they are being chosen over established entities needs to be carefully evaluated before such distributions are approved.

But on the whole, federal and state courts throughout the country have appropriately and rightfully recognized organizations that provide access to justice for underserved and disadvantaged populations as proper beneficiaries of *cy pres*. Their need is palpable. As local, state, federal, and private funding dries up, *cy pres* has become the lifeblood for many organizations that provide individuals any real opportunity for access to justice. It is this promotion of access to justice that benefits the class as a whole at the time of the settlement and benefits its members into the future.

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[44] Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards*: *Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 291 (2014); Arthur H. Bryant, *Cy Pres Awards Don't Have to Be Complicated*, NAT'L L.J., Feb. 9, 2015; Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "*Cy Pres*" Awards to Promote Access to Justice*, FED. LAW., July 2010, at 26, 26–27; Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 LA. B.J. 248, 251 (2011); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. B.J., Mar. 2009, at 12, 14; *see, e.g.*, Lessard v. City of Allen Park, 470 F. Supp. 2d 781, 783–84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (citation omitted)).

Table A: *Cy Pres* by Jurisdiction, Including Statutes, Supreme Court Rules, or Cases if Neither

Alabama	City of Bessemer v. McClain, 957 So.2d 1061 (Ala. 2006)
Arizona	Charles I. Friedman, P.C. v. Microsoft Corp., 141 P.3d 824, 828, 835 (Ariz. Ct. App. 2006)
Arkansas	State v. Eli Lilly & Co., No. CV-2008-4722, 2010 WL 544397, at Sect. VII(A)(2) (Ark. Cir. Feb. 05, 2010) (Trial Order)
California	CAL. CIV. CODE § 384
Colorado	COLO. R. CIV. P. 23(g)
Connecticut	CT. R. SUPER. CT. CIV. § 9-9(g)
District of Columbia	D.C. SUPER. CT. R. CIV. P. 23, cmt.; Boyle v. Giral, 820 A.2d 561, 567–68 (D.C. 2003)
Florida	Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier, No. 98-3763, 2008 WL 6161610, ¶ 33 (Fla. Cir. Ct. Mar. 26, 2008) (Trial Order)
Georgia	Moore v. AMF Bowling Centers, Inc., No. 2003CV66093, 2004 WL 5311900 (Ga. Super. Aug. 27, 2004) (Trial Order)
Hawaii	HAW. R. CIV. P. 23(f)
Idaho	State v. Daicel Chemical Indus., Ltd., No. CV OC 0300114D, 2004 WL 5904008 (Idaho Dist. Dec. 2, 2004) (Trial Order)
Illinois	735 ILL. COMP. STAT. 5/2-807
Indiana	IND. R. TRIAL P. 23(f)
Iowa	Zaber v. City of Dubuque, 902 N.W.2d 282, 287–89 (Iowa Ct. App. 2017)
Kansas	Premier Pork, Inc. v. Rhone-Poulenc, S.A., No. CV2000-3, 2006 WL 1388464, at *4 (Jan. 31, 2006) (Trial Order)
Kentucky	KY. R. CIV. P. 23.05(6)
Louisiana	LA. SUP. CT. R. XLII
Maine	ME. R. CIV. P. 23(f)
Maryland	Boyd v. Bell Atlantic-Maryland, Inc., 887 A.2d 637 (Md. 2005)
Massachusetts	MASS. R. CIV. P. 23(e)
Michigan	Cicelski v. Sears, Roebuck & Co., 348 N.W.2d 685 (Mich. Ct. App. 1984)
Minnesota	MINN. R. CIV. P. 23.05(e)
Missouri	Gerken v. Sherman, 484 S.W.3d 95, 105 (Mo. Ct. App. 2015)
Montana	M. R. CIV. P. 23(i)
Nebraska	NEB. REV. STAT. § 30-3839 (2018)

Nevada	Carpenter v. Henderson Hyundai Superstore Inc., No. 10A622114, 2012 WL 7749208, ¶ 15 (Nev. Dist. Ct. Dec. 18, 2012) (Trial Order)
New Jersey	Sulcov v. 2100 Linwood Owners, Inc., 696 A.2d 31, 43 (N.J. Super. App. Div. 1997)
New Mexico	N.M. DIST. CT. R. CIV. P. 1-023
New York	Klein v. Robert's Am. Gourmet Food, Inc., 800 N.Y.S.2d 766, 773-74 (N.Y. App. Div. 2006)
North Carolina	N.C. GEN. STAT. § 1-267.10 (2018)
Ohio	State v. Countrywide Financial Corp., No. CV08-680445, ¶ 6.1 (Ohio Com. Pl. Dec. 29, 2008) (Trial Order)
Oregon	OR. R. CIV. P. 32(o)
Pennsylvania	PA. R. CIV. P. 1716
Puerto Rico	P.R. LAWS tit. 32A § 20.6(b)
South Carolina	S.C. R. CIV. P. 23(e)
South Dakota	S.D. CODIFIED LAWS § 16-2-57 (2019)
Tennessee	TENN. R. CIV. P. 23.08
Texas	Highland Homes Ltd. v. State, 448 S.W.3d 403 (Tex. 2014)
Vermont	Elkins v. Order Approving Settlement Microsoft Corp., No. 165-4-01 Wmcv., 2005 WL 6235695, ¶ 9 (Vt. Super. Apr. 27, 2005) (Trial Order)
Washington	WASH. SUPER. CT. CIV. R. 23(f)
West Virginia	W. VA. R. CIV. P. 23(f)
Wisconsin	WIS. STAT. § 803.08(10) (2018)